

NOT FOR PUBLICATION - FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

Elton Chongasing,

Plaintiff,

v.

Virgin Islands Housing Authority,  
Ray Fonseca, The Board of  
Commissioners of the Virgin Islands  
Housing Authority, Fitzgerald Rowe,  
Sedonie Halbert, Ira Hobson, Gloria  
Haynes, Shirley Morris, Carmen  
Donovan, and Dawn Brodhurst,

Defendants,

Civil No. 2003-187

**ATTORNEYS:**

**Susan Bruch Moorehead, Esq.**

St. Thomas, U.S.V.I.

*for the plaintiff*

**Rohnda Hospedales, Esq.**

St. Thomas, U.S.V.I.

*for the defendants*

**MEMORANDUM**

Moore, J.

Elton Chongasing has filed a complaint against the defendants seeking damages arising from his termination as an employee of the Virgin Islands Housing Authority ["VIHA"]. The defendants have filed a motion to dismiss all sixteen counts of the complaint, which I will grant in part and deny in part.

**I. FACTUAL BACKGROUND AS PRESENTED IN THE COMPLAINT**

In 2002, Elton Chongasing was employed as Director of Planning and Development at VIHA. Chongasing's workplace environment allegedly became hostile following the appointment of Ray Fonseca as VIHA's executive director in October, 2002. Fonseca and others at VIHA allegedly pressured workers above the age of forty, including Chongasing, to retire early or risk being terminated. (Compl. at ¶ 32.) Chongasing alleges that Fonseca diminished his job responsibilities and reassigned his duties to a younger, female employee. (*Id.* at ¶ 26-31, 35.) On November 18, 2002, Fonseca allegedly promoted the younger, female employee to a newly created position of Interim Director of Modernization and Development. (*Id.* at ¶ 31.)

On December 10, 2002, Fonseca presented to the VIHA Board of Commissioners ["VIHA Board"] a budget reduction plan which included the elimination of certain positions at VIHA. Chongasing's position was listed as one of the positions slated for elimination.<sup>1</sup> (*Id.* at ¶ 13.) The VIHA Board approved Fonseca's plan at the meeting, but, in doing so, allegedly

---

<sup>1</sup> The plan also listed the savings VIHA would receive from each eliminated position. In the space reserved for the savings gained from eliminating Chongasing's position, the plan stated "No Savings." (Compl., Ex. B.) The plan did not note that Fonseca had created the new position of Interim Director of Modernization and Development or the salary costs associated with that new position. (*Id.*)

violated its internal policies because a quorum of Commissioners was not present and no advance notice of the VIHA Board's consideration of Fonseca's plan was provided. (*Id.* at 13-15.)

At the December 10, 2002 meeting, the VIHA Board also amended its personnel policy and procedure manual to eliminate seniority as a factor for personnel reduction decisions. (*Id.* at 34.)

The next day, Fonseca signed a letter informing Chongasing that his position was eliminated effective January 9, 2003 and that he was being placed on Administrative Leave from December 12, 2002 to January 11, 2003. (*Id.*, Ex. C.) Chongasing's complaint does not specify if he resigned his position or otherwise voluntarily terminated his employment before January 11, 2003.

Chongasing administratively appealed his termination. (*Id.* at 18.) On May 17, 2003, the VIHA Board convened a hearing to adjudicate the appeal, however, the hearing allegedly was not completed and was adjourned to be continued at another date and time. (*Id.* at 19.) Chongasing alleges in his complaint that the appeal hearing has never been reconvened. (*Id.* at 20.) On May 14, 2003, VIHA had posted a vacancy notice for the position of Director of Modernization and Development, which Chongasing saw when he attended the May 17, 2003 hearing to adjudicate his appeal. (*Id.* at 36, 39.) Chongasing applied for the position on

May 27, 2003, but alleges that he was never interviewed. (*Id.* at 41.)

On June 10, 2003, Chongasing filed a discrimination charge with the Equal Employment Opportunity Commission. On September 17, 2003, Chongasing received a right-to-sue letter and, on December 18, 2003, he filed a compliant in this Court. In lieu of filing an answer, the defendants filed a motion to dismiss. The claims presented in Chongasing's complaint and the parties' arguments regarding the motion to dismiss are detailed below.

## **II. STANDARD OF REVIEW**

The defendants have filed this motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In considering the defendants' motion to dismiss, I "may dismiss [the] complaint if it appears certain the plaintiff cannot prove any set of facts in support of its claims which would entitle it to relief." See *Bostic v. AT&T of the Virgin Islands*, 166 F. Supp. 2d 350, 354 (D.V.I. 2001) (internal quotations omitted); see also *Julien v. Committee of Bar Examiners*, 34 V.I. 281, 286, 923 F. Supp. 707, 713 (D.V.I. 1996); FED. R. CIV. P. 12(b)(6). I must accept as true all well-pled factual allegations, drawing all reasonable inferences in the plaintiff's favor. See *Bostic*, 166 F. Supp. 2d

at 354; *Julien*, 34 V.I. at 286-87, 923 F.Supp. at 713.

### **III. ANALYSIS**

Chongasing's complaint alleges sixteen counts against the defendants. Counts I through III assert violations of the Virgin Islands Wrongful Discharge Act, Counts IV through VI assert violations of the Age Discrimination in Employment Act, Counts VII-XI assert violations of Title 7 of the Civil Rights Act of 1964. Counts X through XII allege violations of the Americans with Disabilities Act. Count XIII alleges breach of fiduciary duty. Count XIV asserts a breach of contract claim. Finally, Counts XV and XVI allege, respectively, intentional infliction of emotional distress and negligent infliction of emotional distress. The defendants have presented several arguments in favor of dismissing these counts, which I will address below.

#### **A. All Claims Against Individual VIHA Board Members Will Be Dismissed Because the Complaint Contains No Allegations that Constitute Willful Wrong Doing or Gross Negligence**

Chongasing has alleged claims against individual VIHA board members, namely, Fitzgerald Rowe, Sedonie Halbert, Ira Hobson, Gloria Haynes, Shirley Morris, Carmen Donovan, and Dawn Brodhurst. The defendants argue that all claims against these individual board members must be dismissed because the Virgin

Islands Code immunizes them from civil liability. Title 29,  
Section 87 of the Virgin Islands Code provides in part:

Board Members of the V.I. Housing Authority, while acting within the scope of their duties as board members, shall not be subject to personal or civil liability resulting from the exercise of any of the Authority's purposes, duties or responsibilities, unless the conduct of the member is determined by a court of competent jurisdiction to constitute willful wrong doing or gross negligence.

Construing Chongasing's allegations in his favor, I find nothing in his complaint that supports his claim that the VIHA Board members committed "willful wrong doing or gross negligence."

Chongasing's complaint simply alleges that the VIHA Board approved Fonseca's budget reduction plan, eliminated seniority as a factor in personnel reduction decisions, and improperly convened a meeting to adjudicate Chongasing's appeal of his termination but never completed that adjudication. Chongasing's mere reiteration that the VIHA Board acted *ultra vires* and violated his "civil rights under the Constitution's Equal Protection and Due Process" does not explain how any of the alleged board members' actions could amount to willful wrongdoing or gross negligence. Accordingly, I will grant the defendants' motion to dismiss all claims against the individual board members.

**B. Counts I Through III Will Be Dismissed Because The Defendants Are Not Subject to the Wrongful Discharge Act**

Counts I through III of the complaint allege violations under the Virgin Islands Wrongful Discharge Act ["WDA"], codified at 24 V.I.C. § 76 *et seq.* The WDA, however, is not applicable to public employees or public employers. The WDA establishes limits on the grounds for which an "employer" may discharge an "employee." See 24 V.I.C. § 76. An "employer" is defined as "any person acting in the interest of an employer, directly or indirectly, but not a 'public employer' as defined in chapter 14 of this title." 24 V.I.C. § 62 (emphasis added). Chapter 14 of Title 24 states that the term "public employer" means "the executive branch of the Government of the United States Virgin Islands and any agency or instrumentality thereof including . . . the Virgin Islands Housing Authority . . . ." 24 V.I.C. § 362. As the WDA does not apply to public employees or public employers, I will dismiss counts I through III.

**C. Counts IV Through IX**

Counts IV through VI of the complaint allege claims under the Age Discrimination in Employment Act ["ADEA"], codified at 29 U.S.C. § 621 *et seq.* Specifically, Chongasing's complaint states Counts IV through VI in the following manner:

The VIHA violated the ADEA when, inter alia, based on Chongasing's age, it acted or failed to act in the following instances, each constituting a separate and distinct cause of action:

- a. Count IV - Constructively discharging Chongasing; and
- b. Count V - Actually discharging Chongasing effective January 11, 2003; and,
- c. Count VI - Refusing to acknowledge Chongasing's timely application for the position of Director of Modernization & Development, refusing to interview Chongasing, misrepresenting to the EEOC that Chongasing did not submit an application and, upon information and belief, officially appointing Lydia Hughes Director of Modernization & Development.

Counts VII through IX allege claims under Title 7 of the Civil Rights Act of 1964 ["Title 7"], codified at 42 U.S.C. § 2000e-2. Specifically, Chongasing's complaint states Counts VII through IX in the following manner:

The VIHA violated Chongasing's right to equal employment opportunity as protected by Title VII when, inter alia, based on his sex, it acted or failed to act in the following instances, each constituting a separate and distinct cause of action:

- a. Count VII - Constructively discharging Chongasing; and
- b. Count VIII - Actually discharging Chongasing effective January 11, 2003; and,
- c. Count IX - Refusing to acknowledge Chongasing's timely application for the position of Director of Modernization & Development, refusing to interview Chongasing, misrepresenting to the EEOC that Chongasing did not submit an application and, upon information and belief, officially appointing Lydia Hughes Director of Modernization & Development.

The defendants challenge Chongasing's ADEA and Title 7 claims on two grounds. First, the defendants challenge Counts IV and VII, arguing that Chongasing cannot claim constructive



discharge because his complaint does not allege he resigned or quit his position at any time.<sup>2</sup> Second, the defendants challenge all six counts alleged under Title 7 and the ADEA on the grounds that Chongasing's complaint sets forth legitimate non-discriminatory reasons for his treatment. I will address these arguments separately.

**1. Chongasing has failed to allege sufficient facts to support the constructive discharge claims in counts IV and VII**

As noted above, Counts IV and VII allege that Chongasing was constructively discharged in violation of, respectively, the ADEA and Title 7. To establish a claim of constructive discharge, "the plaintiff must allege . . . that she resigned because her employer made her working conditions so unpleasant or difficult that she was forced to resign." *Harley v. Caneel Bay, Inc.*, 193 F. Supp. 2d 833, 838 (D.V.I. 2002). The complaint fails to satisfy this basic standard, as it contains no allegation that Chongasing resigned or otherwise voluntarily terminated his employment relationship with VIHA.

In opposition to the motion to dismiss, Chongasing attempts to cure this defective pleading by stating the following:

---

<sup>2</sup> The defendants also argue that Chongasing has failed to allege facts sufficient to support a claim for the constructive discharge claims set forth in Counts I and X. Because counts I and X will be dismissed on other grounds, I will not address these arguments.

If Defendants claim as part of their defense that Plaintiff was not terminated but resigned voluntarily, as claimed in the administrative proceeding, Plaintiff submits that his claim of constructive discharge is appropriately pled.

(Opp'n to Defs.' Mot. to Dismiss at 12.) In order to give proper notice and comply with the requirement of Rule 8 of the Federal Rules of Civil Procedure that the complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," Chongasing must allege sufficient facts to support his claims and, contrary to his suggestion, these allegations cannot hinge on the arguments presented by the defendants. Given that the Federal Rules of Civil Procedure were enacted to "aid in the determination of the truth and to eliminate from Federal practice the old procedural elements of concealment and surprise," it would violate the spirit of the Rules to make the defendants play such a guessing game. See *Stark v. American Dredging Co.*, 3 F.R.D. 300, 301 (E.D. Pa. 1943). Accordingly, for Chongasing to provide proper notice to the defendants and sufficiently state a claim for constructive discharge, he must allege that he resigned or otherwise voluntarily terminated his employment. As the complaint contains no such allegation, I will dismiss Counts IV and VII.

**2. Counts V, VI, VIII, and XI properly allege claims under the ADEA and title 7**

Having dismissed Counts IV and VII, I will now address the

defendants' arguments in favor of dismissing the remaining claims under the ADEA and Title 7, namely Counts V, VI, VIII, and XI. The defendants argue that Chongasing's complaint does not state a claim under either Title 7 or the ADEA because the complaint sets forth legitimate non-discriminatory reasons for Chongasing's treatment. In making this argument, the defendants rely on facts that have yet to be proved. As stated previously, I must accept as true all of Chongasing's well-pled factual allegations and draw all reasonable inferences in Chongasing's favor. See *Bostic*, 166 F. Supp. 2d at 354. Applying this standard, I cannot on these mere allegations find that Chongasing was dismissed for non-discriminatory reasons. Accordingly, I will deny the defendants' motion to dismiss Counts V, VI, VIII, and XI.<sup>3</sup>

**D. Plaintiff Has Withdrawn His Americans With Disabilities Act Claims and Counts X Through XII Will Be Dismissed**

Counts X through XII of the complaint allege violations under the Americans with Disabilities Act ["ADA"], codified at 42 U.S.C. § 12101 *et seq.* The defendants argue these counts must be dismissed because Chongasing has not alleged that he has a qualifying disability. In opposition to the defendants' motion

---

<sup>3</sup> The defendants argue that I must dismiss the ADEA and Title 7 claims against the individual defendants because individual employees cannot be held liable under these statutes. Chongasing's complaint, however, does not allege that any of the individual defendants violated the ADEA or Title 7.

to dismiss, Chongasing admits he does not have a qualifying disability and states that he withdraws his ADA claims. To effectuate this voluntary withdrawal, I will dismiss counts X through XII.

**E. Plaintiff Has Effectively Withdrawn His Breach of Fiduciary Duty Claim and Count XIII Will Be Dismissed**

In count XIII of his complaint, Chongasing claims breach of fiduciary duty, arguing that the defendants "owed to Chongasing a fiduciary duty to properly exercise the VIHA's purposes, duties and/or responsibilities." The defendants argue that this claim must be dismissed as employers owe no fiduciary duty to employees and Chongasing has alleged no basis for his claim that the defendants were legally obligated to act for Chongasing's benefit.

In opposition, Chongasing does not refute the defendants' argument but instead states that he will amend his complaint to allege breach of the covenants of good faith and fair dealing in place of his claim of fiduciary duty. I construe Chongasing's filing as voluntarily withdrawing his breach of fiduciary duty claim and will effectuate this withdrawal by ordering Count XIII dismissed.

**F. Count XIV Does Not Properly Allege Breach of Contract**

Count XIV of Chongasing's complaint alleges that Fonseca and

VIHA's conduct constituted a breach of his employment contract. The complaint does not specify whether Chongasing has a written contract with VIHA, nor does Chongasing provide any details in his complaint regarding this alleged contract. Chongasing cannot allege breach of contract without at least alleging that a contract existed. Given Chongasing's failure to satisfy the most basic pleading requirements, I will dismiss Count XIV.

**G. Counts XV and XVI Properly Allege Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress**

Counts XV and XVI of the complaint allege, respectively, intentional infliction of emotional distress ["IIED"] and negligent infliction of emotional distress ["NIED"]. The defendants argue that the claim for IIED must be dismissed because Chongasing has not alleged any outrageous or extreme behavior. Similarly, the defendants argue that Chongasing has not alleged that he suffered any physical harm from the defendants' conduct and, therefore, the NIED claim must be dismissed as physical harm is a necessary element.

Essentially, the defendants argue I must dismiss counts XV and XVI because Chongasing has not stated every element necessary to support these claims and has not alleged facts to support each element. Under Rule 8 of the Federal Rules of Civil Procedure, Chongasing is not required to repeat every element of each claim

he alleges, nor is he required to specify facts to support his allegations of IIED and NIED. Unlike his breach of contract claim discussed above, I find the allegations in Chongasing's complaint of IIED and NIED do satisfy the minimal pleading requirements of Rule 8. Accordingly, I will deny the defendants' motion to dismiss as it relates to Counts XV and XVI.

#### **IV. CONCLUSION**

Chongasing's complaint alleges sixteen counts against Virgin Islands Housing Authority, Ray Fonseca, The Board of Commissioners of the VIHA, and several individual VIHA Board members, namely, Fitzgerald Rowe, Sedonie Halbert, Ira Hobson, Gloria Haynes, Shirley Morris, Carmen Donovan, and Dawn Brodhurst.

The Virgin Islands Code protects the individual VIHA Board members from civil liability unless their actions constitute willful wrongdoing or gross negligence. As Chongasing has failed to allege any acts by these individual board members that could constitute willful wrongdoing or gross negligence, I will dismiss all claims against Fitzgerald Rowe, Sedonie Halbert, Ira Hobson, Gloria Haynes, Shirley Morris, Carmen Donovan, and Dawn Brodhurst.

I will also dismiss Counts I through III, as the Wrongful

Discharge Act is not applicable to public employees or public employers. Counts IV and VII will be dismissed because Chongasing has not alleged sufficient facts to support a claim for constructive discharge. Chongasing has voluntarily withdrawn Counts X through XII and Count XIII, which are based on, respectively, alleged violations of the Americans with Disabilities Act and a breach of fiduciary duty. Accordingly, I will dismiss Counts X through XIII. Count XIV will also be dismissed as Chongasing has failed to allege facts sufficient to support a claim of breach of contract.

I will deny the defendants' motion to dismiss counts V, VI, VIII, and IX, as those counts properly allege claims under the ADEA and Title 7. I will also deny the defendants' motion to dismiss counts XV and XVI, which sufficiently state claims of intentional infliction of emotional distress and negligent infliction of emotional distress.

An appropriate order follows.

**ENTERED this 2nd day of August, 2004.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

*Chongasing v. Virgin Islands Housing Authority et al.*  
Civil No. 2003-187  
Memorandum  
Page 16

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

By:\_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

cc: Hon. G.W. Barnard  
Mrs. Jackson  
Susan B. Moorehed, Esq.  
Rohnda Hospedales, Esq.  
Jeffrey Corey, Esq.



NOT FOR PUBLICATION - FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

Elton Chongasing,

Plaintiff,

v.

Virgin Islands Housing Authority,  
Ray Fonseca, The Board of  
Commissioners of the Virgin Islands  
Housing Authority, Fitzgerald Rowe,  
Sedonie Halbert, Ira Hobson, Gloria  
Haynes, Shirley Morris, Carmen  
Donovan, and Dawn Brodhurst,

Defendants,

Civil No. 2003-187

ATTORNEYS:

Susan Bruch Moorehed, Esq.

St. Thomas, U.S.V.I.

*for the plaintiff*

Rohnda Hospedales, Esq.

St. Thomas, U.S.V.I.

*for the defendants*

ORDER

Moore, J.

For the reasons set forth in the memorandum of even date, it  
is hereby

**ORDERED** that the defendants' motion to dismiss all claims  
against individual members of the Virgin Islands Housing

Authority Board of Commissioners, namely, Fitzgerald Rowe, Sedonie Halbert, Ira Hobson, Gloria Haynes, Shirley Morris, Carmen Donovan, and Dawn Brodhurst, is hereby **granted**; it is further

**ORDERED** that the defendants' motion to dismiss, as applied to Counts I, II, III, IV, VII, X, XI, XII, XIII, and XIV, is **granted**; it is further

**ORDERED** that the defendants' motion to dismiss, as applied to Counts V, VI, VIII, IX, XV, and XVI, is hereby **denied**.

**ENTERED** this 2nd day of August, 2004.

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

**By:**\_\_\_\_\_  
**Deputy Clerk**

cc: Hon. G.W. Barnard  
Mrs. Jackson  
Susan B. Moorehed, Esq.  
Rohnda Hospedales, Esq.  
Jeffrey Corey, Esq.